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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-183

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

-vs-

JAMES E. WEBER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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Deputy Defender

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-vs-

JAMES E. WEBER, RESPONDENT

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PRAYER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

May It Please the Court:

The Respondent, James E. Weber, respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the decision of the Appellate Court of Illinois, Third Judicial District.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, is reported at 80 Ill. App. 3d 1025, 400 N.E. 2d 926 (3rd Dist. 1980). A copy of the official opinion, which is not included with the Petition for a Writ of Certiorari, has been attached hereto as Appendix A. Also not included with the Petition for a Writ of Certiorari is the unreported Order of the Appellate Court of Illinois, Third Judicial District, denying the Petition for Rehearing; and so, a copy thereof is attached hereto as Appendix B. The Order of the Illinois Supreme Court denying leave to appeal can be found in the Petition

for a Writ of Certiorari; however, missing therefrom is the Order of the Illinois Supreme Court denying Petitioner's Motion for Leave to File a Motion for Reconsideration of the Order denying Petition for Leave to Appeal. Hence, that final Order is attached to this Brief as Appendix C.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for a Writ of Certiorari. However, as is treated more fully in the Argument portion of this Brief in Opposition, Respondent does not believe that Petitioner has shown any reason for this Court to grant the Petition in the exercise of its sound judicial discretion.

QUESTION PRESENTED FOR REVIEW

Whether the Respondent had standing to contest the legality of a warrantless police entry into his friend's apartment where he was legitimately on the premises entered and was in actual physical possession of the property seized.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment (IV)

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment (XIV)

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the legal protection of the law.

STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case as contained in the Petition for a Writ of Certiorari and in the opinion below.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

THE RESPONDENT HAS SUFFICIENT STANDING TO CONTEST THE LEGALITY OF A WARRANTLESS POLICE ENTRY INTO HIS FRIEND'S APARTMENT BECAUSE HE WAS LEGITIMATELY PRESENT ON THE PREMISES AND BECAUSE HE WAS IN ACTUAL PHYSICAL POSSESSION OF THE PROPERTY SEIZED.

The Respondent asserted Fourth Amendment standing in the Illinois courts not only on the basis of the "automatic standing" rule, but also because he was legitimately on the premises entered and because he was in actual physical possession of the property seized. In his view, these additional grounds are sufficient to afford him standing even in light of this Court's recent decisions in this area of the law.*

The Respondent is, of course, aware that the legitimately-on-the-premises rule for Fourth Amendment standing has been changed by the decision in Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). Nevertheless, this rule was not completely discarded. On the contrary, the majority opinion stated --

> We would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling. 439 U.S. 148.

---

*He further argued in the court below that the prosecution had waived its right to object to his lack of standing, e.g. People v. Zeller, 51 Ill. App. 3d 935, 367 N.E. 2d 488, 490 (3rd Dist. 1977). Hence, with regard to Petitioner's request for summary disposition, it should be recognized that the Respondent is entitled to seek a ruling on his waiver argument in the Illinois Supreme Court even if it is determined that he does not in fact have Fourth Amendment standing in this case.

It is the Respondent's position that legitimate presence in a private dwelling will still confer standing upon guests. However, even if such a guest no longer has sufficient standing to challenge the legality of a full search of the dwelling, it is the Respondent's further contention that a guest would at least have standing to contest an unlawful police entry therein.

The key to the validity of the legitimately-on-the-premises rule is whether it is truly indicative of one's expectation of privacy. In Rakas, this Court did not feel that this is so in all instances, noting that the term "premises" would include areas in which one simply cannot reasonably expect seclusion. [439 U.S. 146]. Then too, it was noted that "cars are not to be treated identically with houses or apartments for Fourth Amendment purpose". [439 U.S. 148]. See also, footnote 15, 439 U.S. 148. Be that as it may, it is submitted that the legitimately-on-the-premises rule retains its validity in cases, such as here, involving Fourth Amendment violations with respect to private dwellings, wherein one has a higher expectation of privacy.

In any event, assuming arguendo that a guest in an apartment has no standing to challenge a search of the apartment, he should at least have the right to contest an unlawful police entry into the apartment since his own privacy is violated thereby. With regard to this point, the following comment from the majority opinion in Rakas is of interest:

> But here petitioners' claim is one which would fail even in an analogous situation in a dwelling place since they have made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger . . . simply would not normally have a legitimate expectation of privacy. (438 U.S. 148).

Here, on the other hand, the Respondent was not seeking to contest the police search into hidden areas of the apartment, but, rather, he challenged only the warrantless entry

which exposed himself to view. Compare United States v. Williams, 589 F. 2d 210, 214 (5th Cir. 1979) which recognized that the Rakas decision did not preclude an automobile passenger from contesting the stop of the automobile. By analogy, a guest in a fixed structure should be accorded standing to contest an unlawful entry into the structure.

It is also significant that the Respondent was in actual physical possession of the property seized, and, this is true notwithstanding this Court's holding in Rawlings v. Kentucky, ___ U.S. ___, 100 S. Ct. 2556 (1980) to the effect that a person in legal possession of a good seized during an illegal search does not thereby always have the right to claim Fourth Amendment protection, 100 S. Ct. 2562. See also United States v. Salvucci, ___ U.S. ___, 100 S. Ct. 2547, 2552 (1980). The fact remains, however, that ownership is still a circumstance to be considered. In this regard, the Respondent endorses the following analysis by Mr. Justice Blackmum in his Rawlings concurrence:

> Nor do I read this Court's decisions to hold that property interests cannot be, in some circumstances at least, weighty factors in establishing the existence of Fourth Amendment rights. Not every concept of ownership or possession is "arcane." . . . 100 S. Ct. 2565.

The Respondent believes that his possession of the property seized, coupled with his legitimate presence on the premises entered, furnishes ample reason to afford him Fourth Amendment standing in this case.

CONCLUSION

Wherefore, the Respondent prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

ROBERT AGOSTINELLI
Deputy Defender

G. JOSEPH WELLER
Assistant Defender
Office of the State Appellate Defender
Third Judicial District
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR RESPONDENT

APPENDIX A

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JAMES E. WEBER, Defendant-Appellee.

Third District No. 79-363

Judgment affirmed.

Opinion filed January 24, 1980.—Rehearing denied March 3, 1980.

1. CONSTITUTIONAL LAW (§169)—*factors considered in establishing standing to challenge constitutionality of search.* Grounds for standing to challenge constitutionality of search and seizure are where accused is charged with crime that includes, as essential element of offense charged, possession of seized evidence at time of contested search and seizure, and where accused was legitimately on premises where search occurred.

2. CONSTITUTIONAL LAW (§169)—*defendant had automatic standing to challenge constitutionality of search—unlawful possession of cannabis.* Accused had automatic standing to challenge constitutionality of search and seizure where accused had been charged with possession of cannabis, crime wherein possession is essential element of offense.

APPEAL from the Circuit Court of La Salle County; the Hon. FRED P. WAGNER, Judge, presiding.

James E. Hinterlong, State's Attorney, of Ottawa (John X. Breslin and Terry A. Mertel, both of State's Attorneys Appellate Service Commission, of counsel), for the People.

Robert Agostinelli and G. Joseph Weller, both of State Appellate Defender's Office, of Ottawa, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The defendant, James E. Weber, was charged with felony theft and unlawful possession of cannabis in indictments returned by the grand jury of La Salle County. Following a pretrial hearing held for the purpose of determining whether evidence of the cannabis was obtained pursuant to an illegal search and seizure, the circuit court granted defendant's motion to suppress the challenged evidence. The People appeal that decision to suppress.

According to testimony elicited at the suppression hearing, on October 17, 1978, the defendant was driving a 1961 Chevrolet automobile accompanied by several others. His destination was Dan Beals' apartment, which he and the others entered upon their arrival. They proceeded to the living room of the apartment with Beals. Sometime thereafter he realized that police officers were present in the room, those officers having entered the apartment silently, without announcement,

and unbeknownst to the defendant. What the police officers saw when they entered the living room portion of Beals' apartment was the defendant, Beals, and several women together with bags of cannabis.

At the suppression hearing previously alluded to, a question was raised first as to whether the intrusion into Beals' apartment constituted an unconstitutional search and seizure and, second, as to whether the defendant had standing to raise an objection. The La Salle County Circuit Court held that the intrusion was illegal and that the defendant had standing to assert that illegality. The cannabis seized was ordered suppressed.

On appeal the People do not raise an issue as to the constitutionality of the search. Rather, the People contend that the defendant lacked standing to complain of the legality of the search, and in so contending they rely primarily on the recent United States Supreme Court decision in *Rakas v. Illinois* (1978), 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421. Such reliance is misplaced.

•1 In a 1960 decision by the same Supreme Court, two grounds for standing to assert the constitutionality of a search and seizure were set forth. (*Jones v. United States* (1960), 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725.) There was established a rule of automatic standing to contest an allegedly illegal search where the same possession needed to establish standing constitutes an essential element of the offense charged. (*Jones v. United States* (1960), 362 U.S. 257, 263, 4 L. Ed. 2d 697, 703, 80 S. Ct. 725, 732.) Secondly, it was expressly stated that anyone legitimately on the premises where a search occurs may challenge its legality. (*Jones v. United States* (1960), 362 U.S. 257, 267, 4 L. Ed. 2d 697, 706, 80 S. Ct. 725, 734. We believe it is quite clear that under either of the two grounds of standing adumbrated by the *Jones* decision, the defendant possessed the standing found by the circuit court.

In their brief, however, the People assert that *Rakas* modifies and overrules the holding in *Jones*. We believe that assertion is only partially correct. It is true that the *Rakas* opinion rejects the legitimately on the premises test as "too broad a gauge for measurement of fourth Amendment rights." (*Rakas v. Illinois* (1978), 439 U.S. 128, 142, 58 L. Ed. 2d 387, 400, 99 S. Ct. 421, 429.) It is also true that the *Rakas* opinion expressly declined to overrule the automatic-standing rule. (*Rakas v. Illinois* (1978), 439 U.S. 128, 135 n.4, 58 L. Ed. 2d 387, 396 n.4, 99 S. Ct. 421, 426 n.4.) Indeed, three different United States Courts of Appeals have considered the effect of *Rakas* on the automatic-standing rule of *Jones*, and each such court has concluded that the automatic-standing rule survives. (*United States v. Salvucci* (1st Cir. 1979), 599 F.2d 1094; *United States v. Mazzelli* (9th Cir. 1979), 595 F.2d 1157; *United States v. Byers* (5th Cir. 1979), 600 F.2d 1130.) The *Mazzelli* court says of *Rakas*:

"That case re-examined the second portion of *Jones* dealing with standing based on interest in the premises searched and the standards that should apply in such cases. However, in substance it re-affirmed the proposition recognized in *Jones* that a possessory interest in that which was seized confers standing." (595 F.2d 1157, 1160.)

Similarly, the *Salvucci* court refused to hold "that the automatic standing rule of *Jones* [had] been implicitly overruled • • • ." 599 F.2d 1094, 1098.

•2 In *Jones v. United States*, the Supreme Court held that a defendant has automatic standing to challenge the legality of a search or seizure if charged with a crime that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. Although questioned and criticized, this rule has not been rejected. In the case *sub judice*, the defendant was charged with possession of cannabis, a crime wherein possession is an essential element of the offense. Thus the offense charged confers the necessary standing. The circuit court correctly permitted the defendant to suppress the evidence seized.

Affirmed.

ALLOY and STENGEL, JJ., concur.

APPENDIX B

Be it Remembered, That, to wit: On the 3rd day of March, 1980 certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

79-363

People of the State of Illinois,

Appellant

vs.

James Weber,

Appellee

Appeal From:
LaSalle County
Hon. Fred P. Wagner
78 CF 192

Now on this day this cause coming on for hearing upon the petition for a rehearing filed herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that said petition for a rehearing herein, be and the same is hereby overruled and denied and that said petitioner pay the costs and charges herein taxed.

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APPENDIX C

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS
SPRINGFIELD
62706

June 24, 1980

Hon. William J. Scott
Attorney General of Illinois
188 West Randolph Street
Chicago, IL 60601

In re: People State of Illinois, petitioner, vs.
James E. Weber, respondent. No. 53258

Dear Mr. Scott:

The Supreme Court today made the following announcement concerning the above entitled cause:

> The motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal is denied. The alternative motion for stay of mandate pending review in the Supreme Court of the United States is allowed.

Very truly yours,

Clerk of the Supreme Court

CLW:jae
cc:James E. Hinterlong
SAASC-Ottawa
SAD-Ottawa

COPY

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OCTOBER TERM, 1979

NO. 80-183

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

-vs-

JAMES E. WEBER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, James E. Weber, by and through his counsel, G. Joseph Weller, Assistant Defender, Office of the State Appellate Defender, Third Judicial District, requests leave to file the attached Respondent's Brief in Opposition without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46. The Respondent was previously granted leave to proceed in forma pauperis in this cause both in the Illinois Appellate and Supreme Courts.

The Respondent's affidavit in support of this Motion is attached hereto.

G. Joseph Weller
G. JOSEPH WELLER

SUBSCRIBED AND SWORN TO
Before me this 3rd day
of September, 1980.

Linda Wenzel
NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-183

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

-vs-

JAMES E. WEBER, RESPONDENT

A F F I D A V I T

I, James E. Weber, being first duly sworn according to law, depose and say, in support of my Motion for Leave to Proceed without being required to prepay costs and fees:

1. I am the Respondent in the above-entitled cause.
2. Because of my poverty I am unable to pay the costs of said cause.
3. I am unable to give security for the same.
4. I believe that I am entitled to the redress I seek in said cause.
5. I was determined to be indigent by the Appellate Court of Illinois, Third Judicial District and counsel was appointed to represent me in both the Illinois Appellate and Supreme Courts.

Further Affiant sayeth not.

James E. Weber

JAMES E. WEBER

SUBSCRIBED AND SWORN TO
Before me this 5th day
of September, 1980.

Wendy Wenzel

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-183

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

-vs-

JAMES E. WEBER, RESPONDENT

CERTIFICATE OF SERVICE

I, G. Joseph Weller, a member of the bar of this Court and representing Petitioners in this cause, certify:

1) That I have served one copy of the Motions for Leave to Proceed in Forma Pauperis, the Affidavits in support thereof, and the Respondent's Brief in Opposition upon the Petitioner herein, by depositing same in a United States Post Office mail box at 628 Columbus Street, Ottawa, Illinois 61350, with first class postage prepaid, and with the envelope addressed as follows:

Honorable Tyrone C. Fahner
Attorney General of Illinois
188 W. Randolph - Suite 2200
Chicago, Illinois 60601

2) The above named party is the only party required to be served.

DATED: September 4, 1980

G. Joseph Weller

G. JOSEPH WELLER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-183

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

-vs-

JAMES E. WEBER, RESPONDENT

AFFIDAVIT OF FILING BY FIRST CLASS MAIL

I, G. Joseph Weller, a member of the bar of this Court and representing Petitioner in this cause, depose and state as follows:

1. That I have properly filed with this Court, pursuant to Rule 28.2, the required number of copies of the Motion for Leave to Proceed in Forma Pauperis, the Affidavit in support thereof, and the Respondent's Brief in Opposition, by depositing same, on this 4th day of September, 1980, in the United States Post Office at 321 West Main Street, Ottawa, Illinois 61350, with first class postage prepaid, and with the envelope addressed to the Clerk of this Court as follows:

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

2. That, to my knowledge, such mailing took place as set forth above and came within the allowed for the filing of the Respondent's Brief in Opposition in this case.

Further, Affiant sayeth not.

G. Joseph Weller

G. JOSEPH WELLER

SUBSCRIBED AND SWORN TO
Before me this 4th day
of September, 1980.

Wendy Wenzel

NOTARY PUBLIC